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5 NATIONAL CREDIT AUDIT CORPORATION

6
7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA

9 DAVID G. RICHARDS,
10 Plaintiff,

11 v.

12 NATIONAL CREDIT AUDIT CORPORATION,
an Illinois Corporation; BONNIER
13 CORPORATION, a Florida Corporation; and
DOES 1 through 50, inclusive,
14 Defendants.
15

) Case No. 08 CV 1436 JAH LSP
) Hon. John A. Houston
) Courtroom 11
)

) **NOTICE OF MOTION AND**
) **MOTION BY NATIONAL CREDIT**
) **AUDIT CORPORATION TO**
) **DISMISS THE COMPLAINT IN ITS**
) **ENTIRETY AND THE THIRD**
) **THROUGH SEVENTH CAUSES OF**
) **ACTION, WITHOUT LEAVE TO**
) **AMEND**
)

16) Date: September 22, 2008
17) Time: 2:30 p.m.
18) Courtroom: 11
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1 TO PLAINTIFF DAVID G. RICHARDS AND HIS ATTORNEYS OF RECORD IN THIS
2 ACTION:

3 PLEASE TAKE NOTICE that on September 22, 2008 at 2:30 p.m., or as soon thereafter
4 as this matter may be heard, in Courtroom 11 of the United States District Court for the Southern
5 District of California, located at 940 Front Street, San Diego, California 92101, the Honorable
6 John A. Houston presiding, Defendant National Credit Audit Corporation ("NCAC") will and
7 does hereby move this Court for an Order Dismissing plaintiff's Third through Seventh Causes
8 of Action in full, without leave to amend, and the entire complaint for failure to meet the
9 pleading requirements mandated by Federal Rule of Civil Procedure 8.

10 This Motion will be made on the grounds that (1) the Third Cause of Action for "Fraud,"
11 the Fourth Cause of Action for "Conspiracy to Commit Fraud," and the Fifth Cause of Action for
12 "Negligent Misrepresentation," each fails to state a claim because plaintiff did not and cannot
13 allege justifiable reliance or pecuniary damages; (2) plaintiff lacks standing to sue under the
14 Sixth Cause of Action for "Unfair Competition (§17200)"; (3) the Seventh Cause of Action for
15 "Intentional Infliction of Emotional Distress" fails to state a claim because it fails to allege
16 extreme and outrageous conduct; and (4) the entire complaint should be dismissed because
17 plaintiff's "shotgun" style pleading fails to set forth a short and plain statement of facts that
18 identify the plaintiff's grounds for relief and fails to provide NCAC with proper notice of the
19 claims against it.

20 This Motion shall be based upon this Notice of Motion and Motion, the concurrently filed
21 Memorandum of Points and Authorities, NCAC's Joinder in Bonnier Corporation's concurrently
22 filed Notice of Motion and Motion to Dismiss, Bonnier Corporation's Memorandum of Points
23 and Authorities in Support of its Motion to Dismiss, the pleadings and records on file herein and
24 upon such other matters as may be presented to the Court at the time of the hearing.

1 Dated: August 12, 2008

POINDEXTER & DOUTRE, INC.

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4 By: s/ James W. Poindexter
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5 Attorneys for Defendant
National Credit Audit Corporation
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of August, 2008 the undersigned caused the foregoing **NOTICE OF MOTION AND MOTION BY NATIONAL CREDIT AUDIT CORPORATION TO DISMISS THE COMPLAINT IN ITS ENTIRETY AND THE THIRD THROUGH SEVENTH CAUSES OF ACTION, WITHOUT LEAVE TO AMEND** to be filed via the Court's electronic filing (cm/ecf) system, which will provide notice to counsel for Plaintiff and Defendant.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that this declaration was executed on August 12, 2008, at Costa Mesa, California.

/s/ James W. Poindexter
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Attorneys For Defendant
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID G. RICHARDS,
Plaintiff,

v.

NATIONAL CREDIT AUDIT CORPORATION,
an Illinois Corporation; BONNIER
CORPORATION, a Florida Corporation; and
DOES 1 through 50, inclusive,
Defendants.

) Case No. 08 CV 1436 JAH LSP
) Hon. John A. Houston
) Courtroom 11

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **MOTION BY NATIONAL CREDIT**
) **AUDIT CORPORATION TO**
) **DISMISS THE COMPLAINT IN ITS**
) **ENTIRETY AND THE THIRD**
) **THROUGH SEVENTH CAUSES OF**
) **ACTION, WITHOUT LEAVE TO**
) **AMEND**

) **[Notice of Motion and Motion, Joinder**
) **in Bonnier Corporation's Motion to**
) **Dismiss, and Proposed Order filed**
) **Concurrently]**

) Date: September 22, 2008
) Time: 2:30 p.m.
) Courtroom: 11

1 In addition to joining Bonnier's Motion, NCAC also moves to dismiss plaintiff's Fifth
 2 Claim, for "Negligent Misrepresentation" brought against NCAC, without leave to amend, on the
 3 grounds that plaintiff did not and cannot allege justifiable reliance or pecuniary damages, both of
 4 which are requisite elements of the Fifth Cause of Action as well.

5 Accordingly, NCAC respectfully requests that this Court dismiss the Third, Fourth, Fifth,
 6 Sixth and Seventh Causes of Action, in full, without leave to amend and the entire complaint for
 7 failing to meet the pleading requirements of Federal Rule of Civil Procedure 8.

8 II. SUMMARY OF ALLEGED FACTS

9 Plaintiff alleges that he received a gift subscription to Popular Science in 2005 and, when
 10 the subscription expired, did not renew and "rejected all of the repeated subscription renewal
 11 offers" made by the publisher, defendant Bonnier Corporation ("Bonnier"). Complaint, ¶ 7.
 12 Plaintiff further alleges that he received a single collection letter from defendant National Credit
 13 Audit Corporation ("NCAC") [Complaint, ¶ 8] that stated that NCAC was a collection agency
 14 attempting to collect a bonafide debt from plaintiff on behalf of Bonnier [*id.*], that plaintiff had
 15 ordered "Popular Science," received various issues and "had not paid for those magazines having
 16 been sent several invoices from the publisher" [Complaint, ¶ 9], that the publisher had "turned
 17 the account over to NCAC for collection," [Complaint, ¶ 10] and that "the letter was an attempt
 18 to collect a debt and that he had thirty days to dispute the debt before it would be considered
 19 valid" [*Id.*]. Plaintiff further admits that he called the phone number provided by NCAC,
 20 selected an option indicating he had never subscribed to the magazine at issue and was then
 21 informed "that his account had been rectified, no amount was owing, and NCAC does not in fact
 22 report to credit agencies." Complaint, ¶ 13.

23 III. ARGUMENT

24 A. THE LEGAL STANDARD.

25 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency
 26 of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive a motion to
 27 dismiss, a complaint must provide "a short and plain statement of the claim showing that the
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pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007). Although a complaint need not include detailed factual allegations, “a plaintiff’s obligation to provide the grounds of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-1965 (internal citation omitted). “Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 1965. In this regard, “[T]he pleading must contain something more...than...a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed. 2004)).

Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *See Neitzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.”). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson*, 749 F.2d at 534.

In reviewing a motion to dismiss under Rule 12(b)(6), the Court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

Marketing Information Masters Inc. v. The Board of Trustees of the California State University System, 552 F. Supp. 2d 1088, 1091-1092 (S.D. Cal. 2008). *See also Rasidescu v. Midland Credit Management Inc.*, 435 F. Supp. 2d 1090, 1094 (S.D. Cal. 2006).

Moreover, in cases like the one brought by Plaintiff, where fraud is alleged, Fed. R. Civ. P. 9(b) requires that “the circumstances constituting fraud or mistake shall be stated with particularity.” *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103-05 (9th Cir. 2003) (claims

sounding “in fraud,” must satisfy Rule 9(b) such that “the particulars of when, where, or how the alleged conspiracy occurred” must be sufficiently plead).

B. LIKE THE THIRD AND FOURTH CAUSES OF ACTION, THE FIFTH CAUSE OF ACTION FAILS BECAUSE PLAINTIFF FAILS TO ALLEGE JUSTIFIABLE RELIANCE OR RESULTING PECUNIARY DAMAGE.

The elements of a claim for negligent misrepresentation are substantially similar to the elements of an intentional fraud claim, the difference being intent. “The elements of negligent misrepresentation include: (1) misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the misrepresentation, (4) ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed, and (5) resulting damage.” *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1201 (9th Cir. 2001). Therefore, as with plaintiff's Third and Fourth Causes of Action, the elements of the Fifth Clause of Action require that plaintiff have been ignorant of the truth, have justifiably relied on the alleged misrepresentations, and have suffered “resulting damage” from that reliance. As with the Third and Fourth Causes of Action, plaintiff cannot satisfy these requirements.

1. Plaintiff Did Not Justifiably Rely on the Alleged Misrepresentation.

In order to establish justifiable reliance, the plaintiff must have “changed her position in justified reliance on the fraudulent misrepresentation resulting in damage.” *Kruse v. Bank of Am.*, 202 Cal. App. 3d 38, 62-63 (1988). Further, the plaintiff must actually have believed that the misrepresentation was true. “In the case of fraudulent misrepresentation, actual reliance occurs only when the *plaintiff reposes confidence in the truth of the relevant representation, and acts upon this confidence.*” *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 808 (2007) (emphasis added).

Here, plaintiff alleges that defendants made false representations that plaintiff ordered and subscribed to Popular Science and, as a result, owed a debt to Bonnier that had been assigned to NCAC to collect. Complaint, ¶¶ 29, 30. Plaintiff further alleges, however, that he “had

rejected all the repeated subscription renewal offers” Bonnier had sent him [Complaint, ¶ 7] and that plaintiff’s own records established that plaintiff “did not in fact owe any debt to Bonnier or NCAC” [Complaint, ¶ 12]. In other words, by plaintiff’s own admission, he knew that the factual claims in the collection letter were not true and then verified that they were not true. *Id.* As a result of such knowledge, plaintiff could not have justifiably relied upon the allegedly erroneous statements in the collection letter because he never “reposed confidence in the truth of the relevant representations.” *Buckland*, 155 Cal. App. 4th at 808. Accordingly, the Fifth Cause of Action must be dismissed for failure to state a claim.

Further, the Fifth Cause of Action, as well as the fraud claims (Third and Fourth Causes of Action), should be dismissed without leave to amend. “It follows that neither the second nor the third count states a cause of action for fraud, actual or constructive, nor, because plaintiff could not justifiably have relied on the alleged misrepresentation, could such counts be amended to state a cause of action.” *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365, 374-375 (1975). Here, plaintiff alleges that he knew he had not subscribed to Popular Science. Consequently, plaintiff could not have relied upon, or been misled by, representations based upon him having subscribed. Plaintiff cannot amend the pleadings to contradict his admission and thus, cannot amend to show belief in the misrepresentations. Accordingly, the Fifth Cause of Action for Negligent Misrepresentation should be dismissed without leave to amend.

2. Plaintiff Did Not Suffer Any Pecuniary Damages and Therefore Cannot State Claims Based upon Deceit.

To be actionable, fraud must result in damages. *South Tahoe Gas Co. v. Hofmann Land Improv. Co.*, 25 Cal. App. 3d 750, 765 (1972). Here, however, plaintiff admits that he called the phone number provided by NCAC and was informed that his account had been rectified. Complaint, ¶ 13. As pecuniary damages are a requisite element of all fraud claims, including negligent misrepresentation, the Fifth Cause of Action fails due to plaintiff’s lack of pecuniary damages.

1 “To state a cause of action at law based upon fraud (as distinguished from a cause of
 2 action in equity for rescission on the ground of fraud), the plaintiff must allege not only reliance
 3 but that, by reason of the fraud, he has suffered pecuniary damage in some amount.” *Gold v. Los*
 4 *Angeles Democratic League*, 49 Cal. App. 3d 365, 374 (1975), citing *Munson v. Fishburn*, 183
 5 Cal. 206, 219-220 (1920); see also *R. D. Reeder Lathing Co. v. Cypress Ins. Co.*, 3 Cal. App. 3d
 6 995, 999 (1970) (“A plaintiff may recover for fraud when he shows that by reason of a
 7 defendant's misrepresentations he has sustained some pecuniary damage or injury by reason of
 8 having been put in a position worse than he would have occupied had there been no fraud.”).

9 Fraud cannot rest solely on emotional distress damages. *De La Cerra Frances v. De*
 10 *Anda*, 224 Fed. Appx. 637, 638 (2007), citing *Schroeder v. Auto Driveaway Co.*, 11 Cal. 3d 908
 11 (1974) (holding that emotional distress damages can be recovered on a fraud claim as an
 12 aggravation of property damage, but not standing alone).” This is so for negligent
 13 misrepresentation claims as well as for intentional fraud. “Here, plaintiff asserts he suffered
 14 emotional injury which gave rise to physical harm. But the gist of his claim is for emotional
 15 injury. ... Moreover, we find California law does not recognize a cause of action for negligent
 16 misrepresentation involving a risk of emotional injury. Therefore, plaintiff has not stated a cause
 17 of action for negligent misrepresentation under the facts of this case.” *Friedman v. Merck & Co.*,
 18 107 Cal. App. 4th 454, 487 (2003).

19 Because plaintiff's own allegations establish that he suffered no pecuniary damage as a
 20 result of the alleged misrepresentation, NCAC's motion to dismiss with respect to the Fifth
 21 Cause of Action should be granted without leave to amend.

22 III. CONCLUSION

23 For the foregoing reasons and the reasons set forth in Bonnier Corporation's Motion to
 24 Dismiss, NCAC respectfully requests that this Court grant its motion and Bonnier
 25 Corporation's Motion to Dismiss, and dismiss, without leave to amend, the Third, Fourth, Fifth
 26 Sixth, and Seventh Causes of Action. NCAC further respectfully requests that plaintiff's
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1 Complaint be dismissed in its entirety for failing to satisfy the pleading requirements of Federal
2 Rule of Civil Procedure 8.

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4 Dated: August 12, 2008

POINDEXTER & DOUTRE, INC.

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6 By: s/ James W. Poindexter
7 James W. Poindexter, Esq.
8 Attorneys for Defendant
9 National Credit Audit Corporation
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Dated: August 12, 2008

POINDEXTER & DOUTRE, INC.

By: s/ James W. Poindexter
James W. Poindexter, Esq.
Attorneys for Defendant
National Credit Audit Corporation
Email: jpoindexter@pdlawyers.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of August, 2008 the undersigned caused the foregoing **MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION BY NATIONAL CREDIT AUDIT CORPORATION TO DISMISS THE COMPLAINT IN ITS ENTIRETY AND THE THIRD THROUGH SEVENTH CAUSES OF ACTION, WITHOUT LEAVE TO AMEND** to be filed via the Court's electronic filing (cm/ecf) system, which will provide notice to counsel for Plaintiff and Defendant.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that this declaration was executed on August 12, 2008, at Costa Mesa, California.

/s/ James W. Poindexter
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